

**DAISY TELLINGTON**  
Claimant

**GENERAL MOTORS LLC**  
Self-Insured Respondent

## ORDER

Self-insured respondent requested review of the August 21, 2013, preliminary hearing Order entered by Administrative Law Judge (ALJ) Kenneth J. Hursh. Zachary Kolich of Shawnee Mission, Kansas, appeared for claimant. Elizabeth R. Dotson of Kansas City, Kansas, appeared for respondent.

The Board, in an Order dated April 24, 2013, previously found claimant sustained bilateral upper extremity injuries by repetitive trauma on November 13, 2012, that arose out of and in the course of her employment. Further, the Board found claimant's work activities were the prevailing factor causing her injuries and need for medical treatment in Docket No. 1,062,753. The Board remanded this matter to the ALJ, who then ordered respondent to provide an authorized physician to treat claimant's injuries. In Docket No. 1,062,754, the Board affirmed the ALJ's finding that claimant's injury is compensable.

The ALJ found claimant's repetitive injury was sustained in Kansas as well as Tennessee, which "is enough to bring the injury under the Kansas act regardless of where the 'legal fiction' of the repetitive injury accident date is set."<sup>1</sup> Further, the ALJ found new evidence submitted by respondent, consisting of claimant's deposition and claimant's writings while at the Tennessee plant, did not justify revisiting the Board's ruling on compensability as the fact of claimant's upper extremity symptoms occurring in Tennessee and reporting same to respondent was previously evident and considered.

<sup>1</sup> ALJ Order (Aug. 21, 2013) at 2. The ALJ noted that by their very nature, repetitive injuries have no literal accident date.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the August 21, 2013, Preliminary Hearing and the exhibits; the transcript of the August 8, 2013 Continuance of Preliminary Hearing by Deposition of claimant and the exhibits; the transcript of the July 31, 2013, Preliminary Hearing and the exhibits; the transcript of the June 5, 2013, Preliminary Hearing; the transcript of the January 2, 2013, Preliminary Hearing and the exhibits; and the transcript of the November 28, 2012, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

### ISSUES

#### Docket No. 1,062,753

Respondent argues claimant's date of accident occurred in 2009 while she was employed at respondent's Tennessee facility; therefore, Kansas is without jurisdiction in this matter. Alternatively, respondent requests the Board find claimant failed to sustain her burden of proving she suffered an injury from repetitive trauma.

Claimant contends her injuries occurred on a repetitive basis within the State of Kansas, and the ALJ correctly determined Kansas has jurisdiction. Further, claimant maintains the specific legal date of accident has already been correctly determined twice in this matter. Regarding the issue of compensability, claimant submits the issue and respondent's arguments should not be considered for review at this time. In the alternative, claimant argues the record reflects that claimant has sustained injuries to her bilateral upper extremities by repetitive trauma arising out of and in the course of her employment with respondent.

#### Docket No. 1,062,754

As in prior proceedings, Docket No. 1,062,754 was not addressed by either the ALJ or respondent, as respondent has accepted this claim as compensable. The findings of the ALJ's January 2, 2013, Order have not been disputed or disturbed by the Board or either party subsequent to said Order. Thus, this Board Member finds there is no need to review facts or prior findings relative to Docket No. 1,062,754.

The issues for the Board's review are:

1. Did the ALJ err in finding the date of accident for repetitive trauma to be November 12, 2012?
2. Is Kansas jurisdiction appropriate?
3. Did claimant sustain the burden of proving her injury was caused by repetitive trauma while employed in Kansas?

FINDINGS OF FACT

Claimant has been employed by respondent since 1985. On December 7, 2009, claimant transferred from respondent's plant in Tennessee to respondent's Fairfax plant in Kansas City, Kansas. Claimant testified that from December 7, 2009, until three months prior to the preliminary hearing on January 2, 2013, she performed a drive-off job. That job required her to get into a new automobile and drive it to a tow-in pit, where she would insert a steering wheel gauge into the steering wheel. Claimant would then lift the hood and use a tool to focus the headlights. Adjusting the headlights required claimant to use a tool similar to an Allen wrench. Claimant would have to turn the wrench 25 to 30 times to adjust each headlight. She would use the wrench with both hands. During each shift claimant would adjust the headlights on 150 automobiles.

While working for respondent in Tennessee in 2009, claimant had numbness and tingling in her hands. In Tennessee, claimant's job was to use an automatic gun shooting screws to install glove boxes and radios. On March 19, 2009, claimant sought authorized medical treatment by obtaining a medical pass from her supervisor, Karen Hawkins. Claimant stated she received authorized medical treatment at plant medical in the form of ice and over-the-counter pain medication. Claimant testified she provided written notice of the injury to respondent by completing a workers' compensation incident report that same day, which was required procedure in Tennessee to be seen by a physician.

In Tennessee, claimant had the right to choose her own physician. She completed an Employee's Choice of Physician form, choosing to be seen by the plant physician. Respondent completed a Safety Incident Report on May 18, 2009, describing claimant's injury as "sprains & strains of wrist & hand - bilateral. (Numbness in right thumb and right hand.)"<sup>2</sup>

Dr. Bruce S. Rubinowicz wrote a June 3, 2009, letter to Joe Shaw, a physician assistant at Saturn Corporation. Dr. Rubinowicz had evaluated claimant's right upper extremity. Claimant complained of tingling and numbness in her right hand and difficulties in the left upper extremity. Claimant attributed her symptoms to use of a power gun at work. The letter indicated a right EMG was performed and that Dr. Rubinowicz suspected claimant might have mild underlying compressive median neuropathy/carpal tunnel syndrome. He prescribed conservative therapy and wrist splints for claimant, although claimant has no recollection of having or wearing said splints. Dr. Rubinowicz's June 3, 2009, letter does not indicate he told claimant her right wrist condition was work related, that he took claimant off work or gave her any restrictions.

Claimant bid for a new position at respondent due to her seniority and because it was a better job in her opinion. She testified she was not instructed to switch positions by

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<sup>2</sup> P.H. Trans. (Aug. 21, 2013), Resp. Ex. 3 at 1.

a physician. After changing positions from shooting screws, claimant's symptoms went away. Claimant's hands were not bothering her when she transferred to Kansas in December 2009.

Medical records from respondent's Fairfax plant indicated that from August 10, 2011, through October 2, 2012, claimant saw Dr. Jesse W. Cheng, Dr. Frederick A. Buck and several nurses for her right wrist injury. On September 28, 2012, Dr. Cheng indicated claimant had a right wrist ganglion cyst and right carpal tunnel syndrome symptoms. Claimant's left upper extremity was not mentioned in any of Dr. Cheng's notes. Dr. Cheng recommended claimant undergo an EMG/NCV of the right wrist. A note dated September 28, 2012, by nurse Kathy J. Conley indicated claimant was referred to Dr. Fishman for an EMG/NCV. A note by Ms. Conley on October 2, 2012, indicated the EMG with Dr. Fishman was cancelled. A note dated October 2, 2012, from nurse Shenida L. Reed-Drew stated that claimant called and asked why the appointment with Dr. Fishman was cancelled, and claimant was told that she should have received a letter in August 2011 denying the workers compensation.

Claimant, at the request of her attorney, was evaluated by Dr. Edward J. Prostic on November 13, 2012. The history obtained by Dr. Prostic indicated that claimant had repetitious trauma to her hands from assembling steering wheels. He also noted claimant had a specific injury on August 10, 2011, when a steering wheel lever fell on her right wrist.

Dr. Prostic performed a physical examination of claimant and noted that claimant had a tissue mass adjacent to the tendon of the flexor carpi radialis at the right wrist. The physical examination also revealed: (1) no heat, swelling, erythema, or atrophy otherwise; (2) range of motion and stability of joints were within normal limits; (3) provocative testing for cubital tunnel syndrome was negative bilaterally; (4) the Tinel test was negative at both wrists; (5) flexion compression median nerve testing was rapidly positive at both hands; (6) pinch strength was satisfactory; (7) maximum grip was 21 kg. on the right compared to 20 kg. on the left and (8) two-point sensory discrimination was somewhat decreased in both the median and ulnar nerve distribution of both hands. Dr. Prostic opined that claimant sustained repetitious trauma to her upper extremities with development of bilateral peripheral nerve entrapment. He also indicated claimant's repetitive trauma while working for respondent was the prevailing factor in causing her injury, medical condition and need for medical treatment.

Respondent had claimant evaluated by Dr. Chris D. Fevurly on December 10, 2012. Dr. Fevurly's report indicated claimant had a previous injury at respondent in the late 2000s, when claimant experienced tingling and numbness into her right hand while working in Tennessee. Claimant reported that her symptoms improved before leaving Tennessee as she took another position with respondent that required no tools. The history obtained by Dr. Fevurly indicated claimant's arm symptoms resolved before her transfer to Kansas.

Dr. Fevurly's physical examination of claimant revealed: (1) a positive Hoffman's

sign in both upper extremities; (2) a positive Phalen's and Reverse Phalen's test bilaterally; (3) a positive Tinel's with percussion of the median nerve at the wrist; (4) the Tinel's over the ulnar nerve was normal; and (5) grip strength of 32 kg. bilaterally.

Dr. Fevurly's diagnoses were: (1) right wrist volar radial ganglion cyst and bilateral carpal tunnel symptoms, right greater than left; (2) hyperreflexia and positive Hoffman's test consistent with possible cervical cord impingement; (3) prior right shoulder injury and (4) obesity. Dr. Fevurly recommended claimant undergo a ganglion cyst resection and a repeat EMG/NCV of the bilateral upper extremities. With regard to causation, Dr. Fevurly stated:

A review of the scientific literature reveals insufficient evidence for establishment of causation between repetitious activity alone as the cause of either ganglion cysts or carpal tunnel syndrome. The combination of force and repetition or force and awkward posture are risk factors for carpal tunnel syndrome but not for ganglion cysts. There is mild support for blunt trauma as the cause of ganglion cysts but the reports from the medical department support that this mass existed prior to the blunt trauma of 8/10/11.<sup>1</sup>

Claimant testified she has not missed work because of her hand conditions at a physician's direction since 2009. Claimant remains employed with respondent.

#### **PRINCIPLES OF LAW**

K.S.A. 2011 Supp. 44-501b(c) states:

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>2</sup> Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.<sup>3</sup>

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<sup>1</sup> P.H. Trans. (Jan. 2, 2013), Resp. Ex. C.

<sup>2</sup> K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, rev. denied 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

<sup>3</sup> K.S.A. 2012 Supp. 44-555c(k).

ANALYSIS

Docket No. 1,062,753

1. Did the ALJ find the appropriate date of accident for alleged hand complaints for repetitive trauma?

In his January 2, 2013 Order, and in the August 21, 2013 Order, the ALJ found the accident date to be November 13, 2012. Another Board Member, on April 23, 2013, affirmed the ALJ's initial determination. This finding will not be modified at this point in the proceeding.

2. Is Kansas jurisdiction appropriate?

Because a determination has been made that the accident date is November 13, 2012, while claimant was working for respondent in Kansas, this claim falls under the jurisdiction of the Kansas Workers Compensation Act pursuant to K.S.A. 44-505(a).

3. Did claimant sustain the burden of proving her injury was caused by repetitive trauma while employed in Kansas?

In the April 24, 2013 Order, another Board Member found claimant proved by a preponderance of the evidence that claimant sustained bilateral upper extremity injuries by repetitive trauma arising out of and in the course of her employment with respondent. This finding will not be modified at this point in the proceeding.

CONCLUSION

While the respondent makes a compelling argument that jurisdiction over this matter lies in Tennessee, at this point in the proceeding this Board Member will not modify a prior Board Order finding that claimant sustained the burden of proving her injuries were caused by repetitive trauma while employed in Kansas and that the ALJ correctly found November 13, 2012, to be the appropriate date of accident for claimant's injury by repetitive trauma. Based upon these two findings, this claim falls under the jurisdiction of the Kansas Workers Compensation Act.

ORDER

**WHEREFORE**, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated August 21, 2013, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of October, 2013.

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HONORABLE SETH G. VALERIUS  
BOARD MEMBER

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Kenneth J. Hursh, Administrative Law Judge